2009

Raymond E. Casaday and Ellen Casaday v. Allstate Insurance Company : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

RAYMOND E. CASADAY and ELLEN CASADAY, Appellants/Plaintiffs, vs. ALLSTATE INSURANCE COMPANY, Appellee/Defendant.	Appellate Case No. 20090371

BRIEF OF APPELLEE

Appeal from the Third District Court, Salt Lake County, State of Utah, the Honorable Joseph C. Fratto, Jr.

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LIST OF ALL PARTIES TO THE PROCEEDING

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JURISDICTIONAL STATEMENT

The Utah Supreme Court had original jurisdiction of this case pursuant to Utah Code Ann. § 78A-3-102(3)(j). The Utah Supreme Court subsequently assigned this case to the Utah Court of Appeals, pursuant to Utah Code Ann. § 78A-3-102(4), by order dated May 6, 2009. The Utah Court of Appeals now has jurisdiction of this case pursuant to the Utah Supreme Court's assignment and Utah Code Ann. § 78A-4-103(2)(j).

However, this Court only has jurisdiction to review the trial court's granting of Defendant's Motion for Summary Judgment. This Court lacks jurisdiction to review the trial court's denial of Plaintiff's three post-judgment motions due to Plaitniffs' failure to file an amended notice of appeal pursuant to Utah R. App. P. 4(b)(2). This Court denied Defendant's Motion for Summary Disposition and deferred ruling on such motion "pending full briefing and plenary presentation and consideration of the case." This Court should now address the jurisdictional issue raised in Defendant's Motion for Summary Disposition.

QUESTIONS PRESENTED FOR REVIEW

I. Did the trial court err in granting Defendant's Motion for Summary Judgment?

a. Standard of Review: Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). "Summary judgments present for review

conclusions of law only, because, by definition, summary judgments do not resolve factual issues. Thus, [this Court] accord[s] no deference to the trial court, but review[s] its conclusions for correctness." *McNair v. Farris*, 944 P.2d 392, 394 (Utah Ct. App. 1997).

II. **Did Plaintiffs' failure to file an amended notice of appeal pursuant to Rule 4(b)(2) of the Utah Rules of Appellate Procedure prevent this Court from exercising jurisdiction over denial of Plaintiffs' three post-judgment motions?**

a. Standard of Review: "The interpretation of a rule of procedure is a question of law that [this Court] review[s] for correctness. *Brown v. Glover*, 2000 UT 89, ¶ 15, 16 P.3d 540.

III. **Did the trial court abuse its discretion in denying Plaintiffs' motion to alter or amend the judgment pursuant to Rule 59(e) of the Utah Rules of Civil Procedure?**

a. Standard of Review: "'A motion or action to modify a final judgment is addressed to the discretion of the trial court, the exercise of which must be based on sound legal principles in light of all relevant circumstances.' That court's determination will be reversed only upon a showing of an abuse of discretion." *Gillmor v. Wright*, 850 P.2d 431, 434 (Utah 1993) (quoting *Laub v. South Central Utah Tel. Ass'n,* 657 P.2d 1304, 1306 (Utah 1982)).

IV. **Did the trial court err in denying Plaintiffs' motion to conform the pleadings to the evidence pursuant to Rule 15(b) of the Utah Rules of Civil Procedure?**

a. Standard of Review: Rule 15(b) allows for mandatory and permissive amendment of pleadings. Under the mandatory prong, the trial court must allow a party to amend a pleading if the parties tried an extraneous issue by express or implied consent. *Fibro Trust, Inc. v. Braham Fin., Inc.*, 1999 UT 13, ¶ 8, 974 P.2d 288. "A court's conclusion that parties tried an issue by express or implied consent is a legal question, which [this Court] review[s] for correctness." *Id.* "However, 'because the trial court's determination of whether the issues were tried with all parties' implied consent is highly fact intensive, [this Court] grant[s] the trial court a fairly broad measure of discretion in making that determination under a given set of facts." *Id.* "Under the permissive prong of the Rule 15(b) analysis, [this Court] will reverse the trial court's denial of a motion to amend only where there is 'no reasonable basis' for its decision." *Eldridge v. Farnsworth,* 2007 UT App 243, ¶ 40, 166 P.3d 169 (quoting *England v. Horbach*, 944 P.2d 340, 345 (Utah 1997)).

V. Did the trial court abuse its discretion in denying Plaintiffs' motion for leave to amend their complaint pursuant to Rule 15(a) of the Utah Rules of Civil Procedure?

a. Standard of Review: This Court can overturn a trial court's denial of a motion to amend a complaint only where the trial court has abused its discretion. *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, ¶ 14, 87 P.3d 734.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Utah Code Ann. § 31A-22-305(9)(b) (2001)

> (9)(b) For *new policies written on or after January 1, 2001*, the limits of underinsured motorist coverage shall be equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum underinsured motorist coverage limits available by the insurer under the insured's motor vehicle policy, unless the insured purchases coverage in a lesser amount by signing an acknowledgement form provided by the insurer that:
>
> (i) waives the higher coverage;
> (ii) reasonably explains the purpose of underinsured motorist coverage; and
> (iii) discloses the additional premiums required to purchase underinsured motorist coverage with limits equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum underinsured motorist coverage limits available by the insurer under the insured's motor vehicle policy.

Utah Rule of Appellate Procedure 4(b)(2)

> A notice of appeal filed after announcement or entry of judgment, but before entry of an order disposing of any motion listed in Rule 4(b), shall be treated as filed after entry of the order and on the day thereof, except that such a notice of appeal is effective to appeal only from the underlying judgment. To appeal from a final order disposing of any motion listed in Rule 4(b), a party must file a notice of appeal or an amended notice of appeal within the prescribed time measured from the entry of the order.

Utah Rule of Civil Procedure 15

> (a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleadings is one to which no responsive pleadings in permitted and the action has not been placed upon the trial calendar, he may so amend it at any time

within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

(b) *Amendments to conform to the evidence.* When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

Utah Rule of Civil Procedure 59(e)

(e) *Motion to alter or amend a judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

STATEMENT OF THE CASE

Nature of the Case

This case arises out of Plaintiffs' claim for underinsured motorist (UIM) benefits above the amounts set forth in their auto insurance policy. Plaintiffs claim that Defendant failed to provide them with sufficient underinsured motorist coverage and have raised claims for breach of contract, insurance bad faith, intentional infliction of emotional distress, and negligent infliction of emotional distress based on that alleged

failure. Based on the allegations and claims articulated in their Complaint, the trial court granted Defendant summary judgment and subsequently denied Plaintiffs' three post-judgment motions. Plaintiffs now appeal the trial court's rulings.

Facts

Plaintiffs were involved in a motor vehicle accident on or about March 18, 2006, in which they allegedly received injuries which exceeded the at-fault party's liability insurance limits. (R. at 3, ¶ 9.) When they made a claim for underinsured motorist benefits with Defendant, Plaintiffs were notified that they had UIM coverage of $10,000/$20,000. (R. at 4, ¶ 12; 411.) Dissatisfied, Plaintiffs filed suit against Defendant. (R. at 1.) Plaintiffs' Complaint alleges, in pertinent part, that Defendant failed to comply with Utah Code Ann. § 31A-22-305(9)(b) (R. at 2, ¶ 9) and that Defendant violated "Utah law," claiming that Defendant should have paid them UIM benefits in an amount in excess of the limits than stated in their insurance policy and more than that purchased by the premiums paid. (R. at 4-5.)

Procedural Details of the Case

Plaintiffs filed their Complaint against Defendant on or about October 18, 2006. (R. at 1-18.) After the end of fact discovery, Defendant filed a Motion for Summary Judgment, arguing that Plaintiffs could not prevail on their claims as stated in their Complaint. (R. at 419-20.) After briefing by both parties and oral arguments, the trial court granted Defendant's Motion for Summary Judgment in a Memorandum Decision dated January 9, 2009. (R. at 715-22.) The Order on Defendant's Motion for Summary Judgment was entered on or about February 11, 2009. (R. at 800-03.) Plaintiffs then

filed three post-judgment motions under Rules 59(e), 15(b), and 15(a), seeking amendment of the Judgment, an order conforming the pleadings to the evidence, and leave to amend their Complaint, respectively. (R. at 765-68.) After briefing by both parties and oral arguments, the trial court denied each of the three post-judgment motions. (R. at 846-51.) Plaintiffs filed their Notice of Appeal on April 30, 2009 (R. at 858-60), before the trial court entered the Order denying the three post-judgment motions on May 8, 2009 (R. at 865-68.) Subsequently, Defendant filed a Motion for Summary Disposition, claiming that Plaintiffs had failed to comply with Rule 4(b)(2) of the Utah Rules of Appellate Procedure. The parties are now in the process of finishing briefing on Plaintiffs' appeal.

SUMMARY OF ARGUMENTS

I

Defendant moved for summary judgment because undisputed facts failed to support the claims identified in Plaintiffs' Complaint. (R. at 356-420.) A review of the Complaint reveals that Plaintiffs based all four of their causes of action on two allegations: (a) Defendant violated Utah Code Ann. § 31A-22-305(9)(b); and (b) Defendant violated "Utah law." (R. at 2, 4-5.) In their Memorandum in Opposition to Motion for Summary Judgment, Plaintiffs conceded that Defendant had not violated Utah Code Ann. § 31A-22-305(9)(b). (R. at 434, 720.) This left the trial court with only one remaining issue—whether Plaintiffs' allegation that Defendant violated "Utah law" was sufficient to provide notice to Defendant of the basis for their claims. Appropriately, the trial court ruled that Plaintiffs' Complaint did not provide sufficient notice to Defendant

of the basis for their claims, even under Utah's liberal pleading standard. (R. at 721.) The trial court relied on this Court's ruling in *Asael Farr & Sons Co. v. Truck Ins. Exch.*, 2008 UT App 315, 193 P.3d 650, for support of its conclusion that Plaintiffs had failed to provide the requisite minimum notice. (R. at 720.) The trial court correctly granted Defendant summary judgment based on the evidence and the claims identified in Plaintiffs' Complaint.

II

Plaintiffs failed to preserve their appeal of the trial court's denial of their three post-judgment motions, preventing this Court from exercising jurisdiction. Plaintiffs filed their notice of appeal in this case after entry of the Order granting Defendant summary judgment, but before the trial court entered an order disposing of Plaintiffs' three post-judgment motions. Under Rule 4(b)(2) of the Utah Rules of Appellate Procedure, Plaintiffs' Notice of Appeal was valid as it pertained to review of the underlying grant of summary judgment. However, this Rule also requires Plaintiffs to file an amended notice of appeal if they wanted to preserve their appeal of the trial court's denial of their three post-judgment motions. Plaintiffs failed to file an amended notice of appeal, thereby preventing this Court from exercising jurisdiction over these post-judgment motions.

III

The trial court is given broad discretion in determining whether to grant a motion to alter or amend a judgment under Rule 59(e) of the Utah Rules of Civil Procedure. In this case, the trial court correctly denied Plaintiffs' Motion to Alter or Amend the

Judgment for several reasons. First, the trial court noted that Plaintiffs were attempting to raise a new argument which had not been previously mentioned in their Complaint. (R. at 866.) Second, Plaintiffs failed to distinguish the *Asael* case or otherwise show its inapplicability to the present case. (*Id.*) Third, Plaintiffs' new argument was directly contrary to the argument made in their Complaint, *i.e.* that Plaintiffs had a "new" policy requiring Defendant to comply with Utah Code Ann. § 31A-22-305(9)(b). (*Id.*) Fourth, Plaintiffs had not even made an attempt, prior to the grant of summary judgment, to seek leave to amend their Complaint to include their new argument. (R. at 867.) Fifth, Plaintiffs were attempting to contravene the trial court's case management order by attempting to raise new claims after all discovery deadlines had passed, and after they realized that their claims failed as a matter of law. (*Id.*) Finally, Plaintiffs raised a new argument in their Rule 59(e) motion that they had not made during the summary judgment proceeding, specifically claiming that they had made an error in citing to the wrong statute in their Complaint. Based on these reasons, the trial court correctly denied Plaintiffs' Rule 59(e) motion to alter or amend the judgment.

IV

This Court should uphold the denial of Plaintiffs' claim for relief under Rule 15(b) for several reasons. First, the relatively recent decisions of Utah's appellate courts support the conclusion that Rule 15(b) does not even apply in a summary judgment setting. Second, the trial court properly denied Plaintiffs' Rule 15(b) motion to conform the pleadings to the evidence because such relief could be granted only if the trial court allowed alteration or amendment of the judgment under Rule 59(e), which it did not do.

Additionally, Plaintiffs provided no factual or legal support for their claim for relief under Rule 15(b). Therefore, the trial court did not err in denying Plaintiffs' Rule 15(b) motion.

V

As with Rule 15(b), the trial court properly exercised its broad discretion in denying Plaintiffs' Rule 15(a) motion for leave to amend their complaint. First, because the trial court denied Plaintiffs' Motion to Alter or Amend, the trial court could not even consider granting this motion for leave to amend. Second, Plaintiffs' motion for leave was untimely. Third, Plaintiffs failed to establish entitlement to relief under Rule 15(a) due to their failure to meet the criteria required for such relief. Therefore, the trial court properly exercised its broad discretion in denying Plaintiff's Rule 15(a) motion.

ARGUMENT

I. THIS COURT SHOULD UPHOLD THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). "Summary judgments present for review conclusions of law only, because, by definition, summary judgments do not resolve factual issues. Thus, [this Court] accord[s] no deference to the trial court, but review[s] its conclusions for correctness." *McNair v. Farris*, 944 P.2d 392, 394 (Utah Ct.

App. 1997). Based on this standard of review, this Court should conclude that the trial court properly granted Defendant's Motion for Summary Judgment.

A. The Trial Court Correctly Granted Defendant's Motion for Summary Judgment.

Defendant filed its Motion for Summary Judgment based on the allegations in Plaintiffs' Complaint and the undisputed facts. Specifically, Defendant argued that Plaintiffs failed, as a matter of law, to establish their four causes of action for breach of contract, insurance bad faith, intentional infliction of emotional distress, and negligent infliction of emotional distress. (R. at 360.) Each of these four causes of action rests solely on the following allegations in Plaintiffs' Complaint:

> 4. On March 18, 2006, plaintiffs were insured by defendant under an automobile insurance policy which was issued by defendant *after January 1, 2001.*
> . . .
>
> 6. *Pursuant to § 31A-22-305(9)(b)*, Utah Code Annotated, the limits of underinsured motorist coverage required to be provided to plaintiffs was an amount equal to the lesser of the limits of their liability coverage or the maximum underinsured motorist coverage limits available by the insurer under the insured's automobile insurance policy, unless the insured purchased coverage in a lesser amount by signing an acknowledgement form meeting the certain statutory requirements.
>
> 7. *This provision* was considered part of the plaintiffs' insurance policy.
> . . .
>
> 12. *In violation of Utah law* and contrary to the facts, defendant advised Plaintiffs that their policy of insurance only provided underinsured motorist

> coverage in the amount of $10,000, up to $20,000, per occurrence.
> . . .
>
> 15. The defendant has refused to pay the limits of underinsured motorist coverage required by the policy *and by law*.
> 16. The defendant's refusal to pay the limits of underinsured motorist coverage required by the policy and *by law* constitutes a breach of the parties' contract of insurance.

(R. at 2, 4-5 (emphasis added).) Plaintiffs based each of their four causes of action on two arguments: (a) Defendant failed to comply with Utah Code Ann. § 31A-22-305(9)(b); and (b) Defendant violated "Utah law." Given the clear and unequivocal language of Utah Code Ann. § 31A-22-305(9)(b), the trial court acknowledged that this statute only applied to "new policies written on or after January 1, 2001." (R. at 720 (emphasis added).) However, Plaintiffs had been insured with Defendant since 1966. (R. at 357, ¶ 3; Appellant's Br. at 9.)

In addressing these two issues, the trial court noted that Plaintiffs had conceded in their Memorandum in Opposition to Motion for Summary Judgment "that their policy would likely be considered as an existing policy, rather than a new policy. . . ." (R. at 434, 720.) In light of Plaintiffs' admission that Utah Code Ann. § 31A-22-305(9)(b) did not apply to their claim as alleged in their Complaint, the trial court was left only to determine whether Plaintiffs' allegations that Defendant had violated "Utah law" satisfied Utah's notice pleading standard, warranting denial of summary judgment.

In addressing this last issue, Plaintiffs raised for the first time their argument that Defendant had violated a different part of the UIM statute, *i.e.*, Utah Code Ann. § 31A-

22-305(9)(g), which applies only to "existing" policies.[1] (R. at 443-48.) Plaintiffs argued that the reference in their Complaint that Defendant had violated "Utah law" complied with Utah Rule of Civil Procedure Rule 8(e)(1) in that it was "simple, concise and direct," and that such allegation should be liberally construed as required by Rule 1(a), purportedly allowing them to raise this new argument related to subsection "g." (R. at 444.) In response to this new argument, which Plaintiffs raised for the first time in their Memorandum in Opposition to Motion for Summary Judgment regarding Plaintiffs' "existing" policy, Defendant refused to consider, let alone argue, the merits of such a new claim, and urged the trial court to do the same. (Ex. "1," at 2-8.)

It is well settled that "a plaintiff is required, under [Utah's] liberal pleading standard of notice pleading, to submit a 'short and plain statement . . . showing that the pleader is entitled to relief' and 'a demand for judgment for the relief.'" *Canfield v. Layton City*, 2005 UT 60, ¶14, 122 P.3d 622 (omission in original) (quoting Utah R. Civ. P. 8(a)(1)-(2)). In addition, "[t]he plaintiff must only give the defendant 'fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.'" *Id.* (citation omitted). However, "*it must do at least that much.*" *Asael Farr & Sons Co. v. Truck Ins. Exch.*, 2008 UT App 315, ¶ 17, 193 P.3d 650 (emphasis added) (citing *Harper v. Evans*, 2008 UT App 165, ¶ 13, 185 P.3d 573). Here, Plaintiffs have not done "at least that much."

[1] Although Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment refers to their new claim as arising under Subsection "h," this particular subsection was renumbered from its original designation as subsection "g." Therefore, for the purpose of continuity, Appellee's Brief will use the subsection "g" designation to refer to the part of the statute which applies to "existing" policies.

In this case, this Court must answer one central question: Is there any allegation in Plaintiffs' Complaint that could possibly lead the trial court, or any reasonable person for that matter, to conclude that Plaintiffs intended to argue or claim that they had an "existing" policy and that Defendant failed to comply with any statutory requirements related to such an existing policy? The answer is "no." In fact, Plaintiffs' Complaint not only cited subsection (b) only, not (g), but it also contained a two substantive claims that were pertinent only under subsection (b). Those allegations were that Plaintiffs' policy was issued by Defendant *after January 1, 2001* (R. at 2, ¶ 4) and that Plaintiffs never signed a UIM acknowledgement form (R. at 3, ¶ 8). Subsection (g) did not require existing insureds to sign an acknowledgement form. Simply alleging that a party has violated "Utah law" does not provide the minimum notice requirements spoken of by the *Canfield* and *Asael* courts. Thus, by definition, Plaintiffs have not complied with Utah's pleading standard sufficient to provide notice to Defendant of the nature and basis of their new claim. The trial court agreed with the reasoning in *Asael* in granting Defendant summary judgment. (R. at 720.)

Despite the clear lack of notice, Plaintiffs insist that a simple reference to "Utah law" satisfies Utah's liberal pleading standard. Specifically, Plaintiffs state that if they had "left out the statutory reference in paragraph 6 of their complaint entirely (the only reference to subsection (b)), their complaint would still have stated a claim against [Defendant]." (Appellants' Br. at 29-30.) Plaintiffs also state that their Complaint would have provided sufficient notice even if the statutory reference to subsection "b" and the reference to when the policy began had been omitted. (Appellants' Br. at 44.) Plaintiffs

rely on this argument based on their contention that simply alleging that Defendant owed Plaintiffs an amount of underinsured motorist coverage equal to their liability limits satisfies their notice requirements. (Appellants' Br. at 27.) If this Court accepted Plaintiffs' argument, then Defendant could also have been theoretically on notice of a myriad of other potential claims. For example, Defendant could have been potentially liable for higher UIM limits based on theories of equitable estoppel, fraud, misrepresentation, reformation, or detrimental reliance, to name a few. But, like Plaintiffs' claim arising under Utah Code Ann. § 31A-22-305(9)(g), Defendant had no notice of any of these other potential theories of liability because nothing in Plaintiffs' Complaint even suggested these legal theories. In fact, the substantive allegations of Plaintiffs' Complaint regarding the lack of a signed acknowledgement show a clear intent to rely on subsection (b).

In sum, the trial court did not commit any error in granting Defendant summary judgment in light of Plaintiffs' failure to adequately plead any claim related to their new argument under subsection "g."

B. The Trial Court's Ruling is Consistent with the Rulings of Other Utah Courts.

In *Asael*, the Utah Court of Appeals addressed whether the allegations in the plaintiff's complaint satisfied the notice requirements stated above. The court noted:

> Nowhere in the third amended complaint, or in the three complaints that preceded it, does [plaintiff] allege that any of the defendants had actually bound adequate coverage but refused to pay the amounts due under that orally bound policy. Rather [plaintiff's] claims, which all arise out of its contention that the defendants failed to ensure that [plaintiff] was covered for all of its significant risks, *are directly contrary to such a position*. And

> we see nothing *in the complaint* to suggest that [plaintiff] intended to assert the existence of adequate coverage as an alternative theory. Consequently, the third amended complaint does not give Appellees fair notice of the nature and basis of the oral binder theory *and was therefore not properly before the court at the time of summary judgment.*

2008 UT App 315, ¶18 (emphasis added) (footnote omitted).

This case reveals three important similarities to the present case. First, the court did not allow the plaintiff to present a claim that was "directly contrary" to its previous position. In the case at bar, Plaintiffs first claimed that their insurance policy was a "new" policy. (R. at 434.) The only other option was that such a policy constituted an "existing" policy, which is exactly opposite of their claim that it was "new." Second, the *Asael* court analyzed "the complaint" to see if the claim was raised as an alternate theory, and made no attempt to determine whether discovery had occurred on that particular claim or whether the opposing party had some other "notice" and opportunity to defend. Finally, the court held that this new issue was "not properly before the court at the time of summary judgment." Plaintiffs here similarly requested that the trial court consider, for the first time, their "existing" policy claim under Utah Code Ann. § 31A-22-305(9)(g) "at the time of summary judgment," which the Utah Court of Appeals has expressly denied. Ultimately, the *Asael* court concluded as follows:

> [Plaintiff's] oral binder claim was first raised, after approximately three years of discovery, in Farr's memorandum in opposition to [defendant's] motion for summary judgment. Rejecting this tactic, the Utah Supreme Court explained: "A plaintiff cannot amend the complaint by raising novel claims or theories for recovery in a memorandum in opposition to a motion to dismiss *or for summary judgment* because such amendment *fails to satisfy Utah's pleading requirements*."

Id. at ¶ 18 (emphasis added) (footnote omitted) (quoting *Holmes Dev., LLC v. Cook*, 2002

UT 38, ¶ 31, 48 P.3d 895). Plaintiffs have also failed to satisfy Utah's pleading requirements.

The Utah Supreme Court has also addressed the tactics being used by Plaintiffs in *Holmes Dev., LLC v. Cook.* In *Holmes*, the plaintiff attempted to raise new claims for breach of duties outside those duties imposed by the contract at issue and which plaintiff had not raised in its complaint. 2002 UT 38, ¶ 30. The court responded by stating that the "claim was originally raised in [plaintiff's] memorandum in opposition to [defendant's] motion to dismiss/for summary judgment, and was not raised in the complaint. . . . *[Plaintiff's] claims must therefore be restricted to the grounds set forth in the complaint.*" *Id.* at ¶ 31 (emphasis added). Again, the Utah Supreme Court did not analyze or address whether the defendant had an opportunity to engage in discovery related to the new claim raised for the first time or whether it had adequate notice beyond the notice required in the complaint. Likewise, the trial court did not allow Plaintiffs to raise their new "existing" policy claim when considering Defendant's Motion for Summary Judgment.

The Utah Court of Appeals in *Harper v. Evans* also came to the same conclusion reached by numerous Utah courts regarding Plaintiffs' attempt to make new claims not raised in their Complaint. In *Harper*, the plaintiff claimed that the defendant "negligently performed the November 2002 surgeries 'and nothing more.'" 2008 UT App 165, ¶ 13, 185 P.3d 573 (quoting *Collins v. Wilson*, 1999 UT 56, ¶ 11 n.9, 984 P.2d 960). However, plaintiff attempted to raise a new argument of defendant's negligent course of treatment after the surgeries. The court held that "[t]hese allegations, standing alone, do not state a

claim for relief for continuous negligent treatment, *even under Utah's liberal notice pleading requirements.*" *Harper*, 2008 UT App 165, ¶ 13. The court further explained:

> In so holding, we emphasize that we cannot rely on the allegations of a negligent course of treatment raised for the first time in the Harpers' opposition to summary judgment. . . . The Harpers were free to seek leave to amend their complaint to allege new or different causes of action, *see* Utah R. Civ. P. 15(a), but having failed to do so they could not effectively raise such new claims in their opposition brief. *See Holmes Dev.,* 2002 UT 38, ¶ 31, 48 P.3d 895 (stating that in the absence of proper amendment, "claims must . . . be restricted to the grounds set forth in the complaint").

Id. at ¶ 14. At the time of the summary judgment proceedings, Plaintiffs had not even sought to amend their complaint, presumably because Utah case law prohibited them from amending at this late stage in litigation, especially when all discovery deadlines had passed, and Defendant would be prejudiced by being required to file an answer to an amended complaint, re-open discovery, conduct extensive discovery on the new issue raised, and further delay resolution of this matter which was ready to be tried. In any event, this Court should not consider any claims that have not been timely and properly raised.

Following the identical analysis that this Court used in *Asael,* and consistent with the decisions in *Holmes* and *Harper*, the trial court properly concluded that "Plaintiffs' [new] argument is directly contrary to their previous position." (R. at 720.) The trial court further noted that Plaintiffs "made no attempt to even suggest [the "existing" policy claim] as an alternate theory." (R. at 720-21.) Finally, the trial court noted that Plaintiffs had not made a request to amend their Complaint. (R. at 721.) Based on the foregoing, the trial court properly granted Defendant's Motion for Summary Judgment.

II. THIS COURT LACKS JURISDICTION TO REVIEW THE TRIAL COURT'S DENIAL OF PLAINTIFFS' THREE POST-JUDGMENT MOTIONS.[2]

It is well established under Utah law that "[f]ailure to timely file an appeal pursuant to Rule 4 constitutes a waiver of the right to appeal. Additionally, failure to make a timely filing deprives an appellate court of jurisdiction over the appeal." *State v. Houskeeper*, 2002 UT 118, ¶ 23, 62 P.3d 444. Plaintiffs filed their Notice of Appeal in response to the trial court's Memorandum Decision denying their three post-judgment motions, but before the trial court entered a final order on those motions. (R. at 858-60.) These three post-judgment motions consisted of a Rule 59(e) motion to alter or amend the judgment, a Rule 15(b) motion to conform the pleadings to the evidence, and a Rule 15(a) motion for leave to amend Plaintiffs' Complaint. (*Id.*) However, this Court lacks the subject matter jurisdiction to review the denial of each of these three motions.

A. This Court Lacks Jurisdiction to Review the Trial Court's Denial of Plaintiffs' Rule 59(e) Motion to Alter or Amend the Judgment.

Plaintiffs have failed to comply with Rule 4 of the Utah Rules of Appellate Procedure and have therefore prevented this Court from exercising jurisdiction over review of the denial of their Rule 59(e) motion. A party has thirty days "after the date of entry of the judgment or order to file a notice of appeal." *See* Utah R. App. P. 4(a). A party may extend the time to appeal from entry of a judgment or order by filing "a motion to alter or amend the judgment under Rule 59 of the Utah Rules of Civil Procedure." Utah R. App. P. 4(b)(1)(C).

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[2] Defendant also incorporates its Memorandum in Support of Motion for Summary Disposition and its Reply Memorandum in Support of Summary Disposition into this section of Appellee's Brief.

However, when a party files a post-judgment motion, the following rule applies:

> A notice of appeal filed after announcement or entry of judgment, but before entry of an order disposing of any motion listed in Rule 4(b), shall be treated as filed after entry of the order and on the day thereof, *except that such a notice of appeal is effective to appeal only from the underlying judgment. To appeal from a final order disposing of any motion listed in Rule 4(b), a party must file a notice of appeal or an amended notice of appeal within the prescribed time measured from the entry of the order.*

Utah R. App. P. 4(b)(2)[3] (emphasis added). Based on the clear and unequivocal language of this rule, Plaintiffs were required to file an amended notice of appeal, but failed to do so.

Plaintiffs filed three post-judgment motions, including a motion under Rule 59 to alter or amend the judgment, after the trial court prepared the initial Memorandum Decision granting Defendant's Motion for Summary Judgment. (R. at 765-68.) The trial court denied these three post-judgment motions in a Memorandum Decision dated April 1, 2009, which was not the final order of the court on these motions. (R. at 846-51.) Subsequently, Plaintiffs filed their Notice of Appeal on April 30, 2009. The trial court then entered a final order disposing of Plaintiffs' post-judgment motions on May 8, 2009. (R. at 865-68.)

Under the clear and unambiguous language of Rule 4(b)(2), Plaintiffs' Notice of

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[3] The federal equivalent of this rule also requires the filing of an amended notice of appeal, and states:

> (ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)A), or a judgment altered or amended upon such a motion, *must file a notice of appeal, or an amended notice of appeal*—in compliance with Rule 3(c)—*within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.*

Fed. R. Civ. P. 4(a)(4)(B)(ii).

Appeal, having been filed prior to entry of the order disposing of their Rule 59 motion, "is effective only to appeal from the underlying judgment." In this case, the Notice of Appeal conveys jurisdiction to this Court to review only the trial court's grant of summary judgment, and not the trial court's denial of the subsequent Rule 59 motion. In order to provide this Court jurisdiction to review the denial of their Rule 59 motion, Plaintiffs were required to file an amended notice of appeal within the prescribed time measured from the entry of the order pursuant to Rule 4(b)(2), which in this case was thirty (30) days after entry of the order denying such motion on May 8, 2009. However, Plaintiffs did not file an amended notice of appeal at any time after entry of the May 8, 2009 order. Therefore, Plaintiffs' failure to file an amended notice of appeal prevents this Court from exercising subject matter jurisdiction to review the district court's denial of their Rule 59 motion.

B. This Court Should Deny Plaintiffs' Request for Wholesale Abandonment of Rule 4(b)(2).

Plaintiffs primarily argue that Rule 4(c) governs all appeals, including appeals of post-judgment motions, instead of Rule 4(b)(2), contrary to the plain language of these Rules. Prior to November 1, 2005, a party that filed a notice of appeal prior to disposition of any of the post-judgment motions listed in Rule 4 was required to file an amended notice of appeal. Otherwise, the entire notice of appeal was invalid.

In an effort to ameliorate this harsh result, the Utah Supreme Court amended Rule 4 and created subsection (b)(2), which validated any notice of appeal filed prior to entry of an order on any of the listed post-judgment motions. Based on this amendment, a

party was no longer required to file an amended notice of appeal to preserve its appeal of the "underlying judgment." However, Rule 4(b)(2) still required a party to file an amended notice of appeal in order to preserve an appeal from the trial court's ruling on the post-judgment motions, which did not constitute the "underlying judgment."

Based on the creation of subsection (b)(2), this special rule only applied to cases where a party filed one of the listed post-judgment motions. Rule 4(c) applies to the rest of cases where no post-judgment motion is filed. However, Plaintiffs now urge this Court to conclude that Rule 4(c) should govern all notices of appeal, requiring abandonment of Rule 4(b)(2). This argument contradicts well-established statutory construction principles which require this Court to give meaning, if possible, to all provisions of a statute, or in this case, to a Rule of Appellate Procedure. *See Lund v. Brown*, 2000 UT 75, ¶ 23, 11 P.3d 277 (applying statutory construction principles to interpretation of Utah Rules of Civil Procedure) (citation omitted). Furthermore, "[a]ny interpretation which renders part or words in a statute inoperative or superfluous should be avoided." *Id.* (quoting *State v. Hunt*, 906 P.2d 311, 312 (Utah 1995)). In this case, Plaintiffs urge this Court to make rule 4(b)(2) inoperative and superfluous. Therefore, giving meaning to Rule 4(b)(2), this Court should rule that Plaintiffs' failure to file an amended notice of appeal to include the three post-judgment motions prevents this Court from exercising jurisdiction over such motions.

In addition to requesting that this Court render Rule 4(b)(2) meaningless, Plaintiffs also incorrectly interpret the clear language of this Rule in stating the following:

The trial court's Memorandum Decision denying the

> Casadays' post-judgment motion was dated April 1, 2009, signed April 2, 2009, and filed April 7, 2009. The Casadays filed their notice of appeal on April 30, 2009, after the court announced its decision denying their post-judgment motion *and within thirty days of the earliest possible date from which the time to appeal could have run.*

(Mem. Opp'n. Mot. Summ. Disposition, at 10 (emphasis added).) Such a conclusion that the appeal period could have run from the date of the Memorandum Decision on April 1, 2009 contradicts Utah law. Plaintiffs elaborate on this misconstruction of Utah law in their "Response to Allstate's Statement of Facts," in which they state:

> However, the Memorandum Decision also did not state that it was not the final order of the court, and it did not direct counsel to prepare a written order. It simply said that "Defendant's Motion for Summary Judgment is granted." *Thus, the January 9, 2009 Memorandum Decision could have constituted a final, appealable order.*

(*Id.* at 3 (emphasis added).) Based on these statements, Plaintiffs fail to acknowledge the necessary application of the ruling in *Code v. Utah Dept. of Health,* 2007 UT 43, 162 P.3d 1097.

In *Code*, the Utah Supreme Court addressed whether a memorandum decision issued by a district court constituted entry of a final judgment for purposes of appeal. *Id.* at ¶ 4. The *Code* court held that under Rule 7(f)(2) of the Utah Rules of Civil Procedure, a memorandum decision does not constitute the final order of the court unless it explicitly so states. *Id.* at ¶¶ 5-6. In that case, the memorandum decision did not state that it was the final order of the court, and did not instruct a party to prepare an order. *Id.* at ¶ 5. In response to this factual scenario, the Utah Supreme Court stated:

> The plain language of rule 7(f)(2) does not permit overriding

> the requirement of an order by implication or inference. Either an order must be submitted by the prevailing party or the court must give the parties *explicit* direction that no order is required. We see no benefit to a system in which parties must guess, on a case-by-case basis, whether a judge's language in a memorandum decision "implie[s]," "invite[s]," or "contemplate[s]" further action by the parties. Not only would such a system be unwise in practice, it is at odds with the express mandate of rule 7(f)(2). It is the district court's role to clearly direct that no order needs to be submitted; otherwise, an order is required. A court should include this explicit direction whenever it intends a document—a memorandum decision, minute entry, or other document—to constitute its final action. Otherwise, rule 7(f)(2) requires the preparation and filing of an order to trigger finality for purposes of appeal.

Id. at ¶ 6 (emphasis in original)(internal citations omitted). Here, neither party submitted a proposed order in conjunction with their memoranda, nor did the Memorandum Decision explicitly direct the parties to forego submission of an order. Therefore, based on the holding in *Code*, the trial court's Memorandum Decision dated April 1, 2009 did not constitute the final, appealable order, and did not commence the running of the limitations period for preserving the appeal.

Given this misconstruction of Utah law, Plaintiffs argue that Rule 4(b)(2) should be limited only to situations where a notice of appeal is filed before *announcement* of a trial court's decision on a post-judgment motion, rather than to a notice of appeal filed after *announcement* of a decision. This argument lacks merit and reason, and begs the questions as to why any party would ever file a notice of appeal of a post-judgment motion before a trial court even rules on the motion. Although a party may anticipate losing a post-judgment motion, there is no reason to undergo the time and expense in

preparing a notice of appeal when the party does not even know the trial court's decision, let alone filing such an appeal with the court. Therefore, Plaintiffs' interpretation of Rule 4(b)(2) would inappropriately and illogically restrict its scope to impossible scenarios.

This Court should resist such a wholesale abandonment of Rule 4(b)(2) as Plaintiffs implicitly urge, and should hold that Plaintiffs' failure to file an amended notice of appeal after entry of the order disposing of their post-judgment motions prevents this Court from exercising jurisdiction over all issues other than the underlying judgment.

C. This Court Lacks Jurisdiction to Review the Trial Court's Denial of Plaintiffs' Rule 15 Motions.

In addition to the Rule 59 motion, Plaintiffs also filed two motions under Rules 15(a) and 15(b) of the Utah Rules of Civil Procedure. However, this Court also lacks jurisdiction to review the trial court's denial of these two motions, each of which sought permission from the trial court to allow amendment of Plaintiffs' Complaint. This very Court established that a plaintiff cannot obtain relief in the form of amendment to a pleading under Rule 15 unless the trial court first grants either a Rule 59(e) or 60(b) motion. *See National Advertising Co. v. Murray City Corp.*, 2006 UT App 75, ¶ 13, 131 P.3d 872 (citing *Combs v. Price Waterhouse Coopers*, 382 F.3d 1196, 1205 (10th Cir. 2004) ("After a district court enters a final judgment it may not entertain motions for leave to amend unless the court first sets aside or vacates the judgment pursuant to [rules] 59(e) or 60(b)."); *Turville v. J & J Properties, L.C.*, 2006 UT App 305, ¶ 28, 145 P.3d 1146 (quoting *Nichols v. State*, 554 P.2d 231, 232 (Utah 1976)).

In this case, the trial court denied Plaintiffs' Rule 59(e) motion. Based on Rule 4

of the Utah Rules of Appellate Procedure, Plaintiffs failed to preserve any right to appeal the denial of the Rule 59 motion for failing to file an amended notice of appeal after entry of the final order. Since Plaintiffs cannot obtain review of the trial court's denial of their Rule 59(e) motion, this Court does not have jurisdiction to review the denial of the Plaintiffs' Rule 15 motions, because the prerequisite to such review, *i.e.* the granting of either a Rule 59(e) or 60(b) motion, is also outside the jurisdictional reach of this Court. Therefore, this Court lacks jurisdiction to review the trial court's denial of the Plaintiffs' Rule 15 motions.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' RULE 59(e) MOTION TO ALTER OR AMEND THE JUDGMENT.

Even if this Court were to conclude that Plaintiffs had somehow properly preserved their appeal of the trial court's denial of their three post-judgment motions despite their failure to comply with Rule 4(b)(2), the trial court still did not abuse its discretion in denying Plaintiffs' Rule 59(e) motion to alter or amend the judgment. In order to merit relief under Rule 59(e), a party must show any of the grounds set forth under Rule 59(a). *See Hume v. Small Claims Court of Murray City*, 590 P.2d 309, 311 (Utah 1979). In this case, Plaintiffs claim entitlement to relief based on (1) "[A]buse of discretion by which either party was prevented from having a fair trial[;] (6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law[;] and (7) Error in law." (R. at 728; Appellants' Br. at 34.)

In sole support of their Rule 59(e) motion, Plaintiffs raised a new argument which they had not raised during the summary judgment proceedings—that they mistakenly

alleged the wrong statute in their Complaint. That argument lacks any merit in light of Plaintiffs' other allegations herein. Despite this new argument, the trial court found that Plaintiffs had failed to establish entitlement to relief under Rule 59(e) for several reasons. Plaintiffs' new argument of erroneous citation to the wrong statute lacks merit and the cases cited by Plaintiffs support Defendant's position. Finally, Plaintiffs have misconstrued the basis for the trial court's denial of their motion.

A. The Trial Court Properly Exercised Its Discretion.

In its Memorandum Decision, the trial court cited to several justifications which support its denial of Plaintiffs' Rule 59(e) motion, and which show that it did not abuse its discretion. First, the trial court noted that Plaintiffs were attempting to raise a new argument which had not been previously raised in their Complaint. (R. at 866.) Second, Plaintiffs failed to distinguish the *Asael* case or otherwise show its inapplicability to the present case. (*Id.*) Third, Plaintiffs' new argument was directly contrary to the argument made in their Complaint, *i.e.* that Plaintiffs had a "new" policy requiring Defendant to comply with Utah Code Ann. § 31A-22-305(9)(b). (*Id.*) Fourth, Plaintiffs had not even made an attempt, prior to the grant of summary judgment, to seek leave to amend their Complaint to include their new argument. (R. at 867.) Fifth, Plaintiffs were attempting to contravene the trial court's case management order by attempting to raise new claims after all discovery deadlines had passed, and after they realized that their claims failed as a matter of law. (*Id.*)

B. Plaintiffs' Claim That They Cited to the Wrong Statute in Error Lacks Merit.

Once Plaintiffs determined that their Complaint failed to meet Utah's liberal pleading standard, they raised a new argument which they failed to raise during the summary judgment proceedings. This new argument alleges that Plaintiffs simply cited to the wrong statute, as if it were some type of clerical error. (R. at 732-35; Appellants' Br. at 3, 34.) This argument lacks merit in light of the other allegations in Plaintiffs' Complaint.

Paragraph 4 of Plaintiffs' Complaint specifically alleges that "plaintiffs were insured by defendant under an automobile insurance policy which was issued by defendant *after January 1, 2001*." (R. at 2, ¶ 4 (emphasis added).) Also, Plaintiffs' Complaint alleges that Plaintiffs never signed a UIM acknowledgment form for Defendant. (R. at 2, ¶ 8.) Such signed acknowledgement forms are required only for new policies, not for existing policies as of January 1, 2001. *See* Utah Code Ann. § 31A-22-305(9)(g). For Plaintiffs to claim that their reference to Utah Code Ann. § 31A-22-305(9)(b) was simply an error on their part, would require this Court to ignore all other efforts by Plaintiffs to allege that Defendant failed to comply with the statutory requirements specific to "new" insurance policies issued after January 1, 2001 as stated in this statute. Plaintiffs' "new policy" argument was central to Plaintiffs' allegation of supposed bad faith, so Plaintiffs cannot discard that claim so easily.

C. The Cases Cited by Plaintiffs Support Defendant's Position.

Additionally, in their Reply Memorandum in Further Support of Motion to Alter

or Amend the Judgment, to Conform the Pleadings to the Evidence, or For Leave to Amend, Plaintiffs cite to several cases from other jurisdictions for the proposition that a mere recitation to an incorrect statute should not deprive a party from pursuing claims. (R. at 817 n. 14-15.) However, these cases support Defendant's position that it did not have adequate notice of Plaintiffs' new argument regarding their "existing" insurance policy.

For example, Plaintiffs cite to the case of *Huss v. Green Spring Health Serv., Inc.*, 18 F.Supp2d 400, 402 (D. Del. 1998) (R. at 817 n.15.), where the United States District Court for the District of Delaware quoted from Wright & Miller, *Federal Practice and Procedure* §1210, and stated: "[a] reference to the wrong statute . . . will be corrected by the court *if it can determine the appropriate statute . . . from the complaint.*" 18 F.Supp.2d 400, 402 (emphasis added) (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1210, at 121.) By this very standard, the trial court could not have determined which statute Plaintiffs intended to reference based on the allegations in their Complaint. The Complaint simply stated the allegations that Plaintiffs had a "new" policy and that Defendant failed to provide coverage based on Utah Code Ann. § 31A-22-305(9)(b) and Utah law. (R. at 4-5, ¶¶ 12-16.) However, nothing in the Complaint would lead the trial court, Defendant, or this Court, to determine Plaintiffs' reliance on Utah Code Ann. § 31A-22-305(9)(g) regarding "existing" policies as a separate basis for recovery.

Similarly, Plaintiffs cite to the case of *Roman v. City of Middletown Bd. of Educ.*, (R. at 817 n.15.) for the proposition that a court should not grant summary judgment

"against a plaintiff based on her reference to the wrong statutes because "*the facts plead[ed] in the Complaint do state a cause of action" under the correct statute.*" (Mem. Supp. Mot. to Alter or Amend 8 n.15 (emphasis added) (quoting 2007 WL 866480, at *3 (Conn. Super Ct. 2007)).

Plaintiffs' errors amount to more than a mere incorrect citation to the appropriate statute—they represent a failure altogether to support any claim under subsection "g." Here, Plaintiffs' Complaint completely failed to advise Defendant of the factual essence of their new bad faith theory. Furthermore, this effort to change the factual basis for a bad faith claim reveals the mercurial nature of the claim, and its lack of legitimacy. This Court should resist Plaintiffs' mischaracterization of the failure in their Complaint as merely a citation to a wrong statute and uphold the trial court's decision to grant summary judgment due to Plaintiffs' failure to even allege any facts to support their claims under subsection "g" and their failure even to request leave of court to amend their Complaint.

D. Plaintiffs Misconstrue the Trial Court's Basis for Grant of Summary Judgment and Denial of Their Rule 59(e) Motion.

In addition to improperly characterizing their citation to Utah Code Ann. § 31A-22-305(9)(b) as a mere error in citation, Plaintiffs have misconstrued the basis for the trial court's grant of summary judgment or denial of their motion to alter or amend the judgment under Rule 59(e). In their appellate brief, Plaintiffs summarize the trial court's actions in granting summary judgment and denying their Rule 59(e) motion by stating that the trial court "held that the Casadays' reference in their complaint to subsection (b)

of section 31A-22-305(9) was fatal to their claims." (Appellants' Br. at 34.) This was not the trial court's basis for granting summary judgment or denying their motion. What was "fatal to their claims" was Plaintiffs' failure to make a single allegation in the Complaint to put Defendant on notice of their new claim under subsection "g."

The trial court relied on this Court's decision in *Asael Farr & Sons Co. v. Truck Ins. Exch.,* 2008 UT App 315, 193 P.3d 650 to grant Defendant summary judgment. (R. at 720-21; *see also* R. at 801, ¶ 7 (discussing Plaintiffs' contradictory new claim).) It should be noted that Plaintiffs failed even to cite the *Asael* case in their entire appellate brief, much less to distinguish it from the present case. Based on that case, it became apparent that Plaintiffs' new argument, which took a completely contradictory position to that stated in their Complaint, could not withstand the analysis set forth by this Court.

In summary, even if this Court were to find that it has jurisdiction of Plaintiff's Rule 59(e) motion despite Plaintiffs' failure to comply with Rule 4(b)(2) of the Utah Rules of Appellate Procedure, this Court should still find that the trial court did not abuse its broad discretion in denying Plaintiff's Motion to Alter or Amend the Judgment under Rule 59(e). Plaintiffs' sole argument in support of this motion is that they made an error in citing to the wrong statute. This argument, however, lacks merit based on the obvious reference to this statute in paragraphs 4 and 8 of Plaintiffs' Complaint, which specifically states that their insurance policy was obtained after January 1, 2001 and refers to requirements applicable only to new policies. Furthermore, the cases which Plaintiffs rely on to support their claim of erroneous citation ironically support Defendant's position that nothing in the Complaint could point to Plaintiffs' new basis of recovery

under Utah Code Ann. § 31A-22-305(9)(g). Finally, Plaintiffs have misconstrued the basis of the trial court's decision to grant summary judgment and deny their Rule 59(e) motion, and have failed altogether even to mention the *Asael* case, on which the trial court relied heavily for support of its rulings. Therefore, this Court should uphold the trial court's denial of Plaintiffs' Rule 59(e) motion.

IV. THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFFS' RULE 15(b) MOTION TO CONFORM THE PLEADINGS TO THE EVIDENCE.

This Court should uphold the trial court's denial of Plaintiffs' Rule 15(b) motion to conform the pleadings to the evidence, for four reasons. First, Rule 15(b) does not apply to motions for summary judgment. Second, even if this Rule applied, Defendant failed to file this motion on a timely basis. Third, the trial court could not grant relief under this Rule because it denied Plaintiffs' Rule 59(e) motion. Fourth, Defendant never "tried" any issue not raised in the pleadings by express or implied consent.

A. Rule 15(b) Does Not Apply to Summary Judgment Proceedings.

Rule 15(b) does not even apply to motions for summary judgment. Although Plaintiffs assert that "Rule 15(b) applies to motions as well as to trials," (R. at 736; Appellants' Br. at 35.), they overlook Utah law in making such a bold assertion.[4] Whether Rule 15(b) applies to motions for summary judgment in Utah has never been specifically decided by our courts. *See Eldridge v. Farnsworth*, 2007 UT App 243, ¶35, 166 P.3d 639. In fact, there is stronger case law support for the assertion that Rule 15(b) does not apply to motions for summary judgment. *See id.* at ¶ 35 n.13. Rule 15(b) makes

[4] This Court should note that in making this assertion, Plaintiffs cite to New York and South Dakota cases for support, and not to a Utah case.

sense in the context of trials, where evidence is submitted, not in the context of pre-trial motions.

The *Eldridge* court points out that a split exists among the federal circuits as to whether Rule 15(b) applies to summary judgments as opposed to trials. *Id.* at ¶35 n.13. However, the court also pointed out that most recently, the Utah Supreme Court has cited with approval the case of *Domar Ocean Transp. v. Independent Refining Co.*, 783 F.2d 1185, 1188 (5th Cir. 1986), which states that implied consent only applies if parties recognized that an issue not raised in the pleadings was admitted at trial. *Id.* (citing *Archuleta v. Hughes*, 969 P.2d 409, 413 (Utah 1998) and *Keller v. Southwood N. Med. Pavilion, Inc.*, 959 P.2d 102, 105 (Utah 1998) for support that Rule 15(b) only applies to trials and not to summary judgments).

Additionally, nothing in Rule 15(b) specifically allows its application on a motion for summary judgment and, in fact, specifically states that it applies only to "trials." Rule 15(b) used the word "tried" once and "trial" twice. Therefore, consistent with the recent trend in Utah courts in acknowledging that Rule 15(b) applies to "trials," and based on the clear and unambiguous language of the Rule itself, this Court should hold that Rule 15(b) does not apply in this case after the granting of summary judgment.

B. Plaintiffs Failed to File a Timely Motion Under Rule 15(b).

Utah courts have long held that denial of a motion to amend based on untimeliness is not an abuse of discretion. *See Atcitty v. Bd. of Educ. of San Juan Cty. Sch. Dist.*, 967 P.2d 1261 (Utah Ct. App. 1998). In *Atcitty*, the court addressed the timeliness of plaintiff's motion to amend and held the following:

> We conclude that the trial court did not abuse its discretion in denying appellant's Motion to Amend. First, appellant attempted to set forth new issues in his amended complaint. *Second, appellant filed his motion approximately two-and-a-half months after the discovery deadline, and after both parties had filed summary judgment motions. Third, we conclude that appellant was aware of the "new issues" raised in the amended complaint long before his motion was filed, and that there was no justifiable reason for the delay.* We therefore affirm the trial court's denial of appellant's Motion to Amend his complaint.

Id. at 1264-65 (emphasis added). In this case, Plaintiffs run afoul of each of the factors addressed in *Atcitty*, except that Plaintiffs' actions are even more egregious. Plaintiffs certainly waited until well over one year after the original case management order deadline for fact discovery had passed (R. at 38) and over eight months passed after the amended scheduling order deadline for fact discovery (R. at 238) before filing their Motion for Leave to Amend. Second, Plaintiffs waited until after Defendant had filed its Motion for Summary Judgment. (R. at 419-20.) Third, by Plaintiffs' own admissions, they were aware of the "new" issue raised in their Memorandum in Opposition to Motion for Summary Judgment long before they filed their motion. (R. at 434, 445.) Finally, Plaintiffs have failed to provide any justifiable reason for the delay.[5] Therefore, this Court should find that Plaintiffs' Rule 15(b) motion was untimely in light of the broad discretion applicable to such a finding.

C. The Trial Court Could Not Grant Relief Under Rule 15(b) Based on its Denial of Plaintiffs' Rule 59(e) Motion.

As more fully briefed in Part II.C., *supra*, the trial court did not err in denying

[5] Plaintiffs only unjustified reason is that they believed that simply alleging that Defendant had breached "Utah law" was all that was necessary to meet Utah's liberal pleading standard and that they believed that their Complaint was sufficiently broad to include the new claim. (Appellants' Br. at 46.)

Plaintiffs' Rule 15(b) motion because it did not grant Plaintiffs' Rule 59(e) motion, a prerequisite to such relief. Without amending the judgment, the trial court could not allow amendment of a pleading. *See National Advertising Co. v. Murray City Corp.*, 2006 UT App 75, ¶ 13, 131 P.3d 872. Therefore, this Court should uphold the trial court's denial of Plaintiffs' Rule 15(b) motion.

D. Defendant Never Expressly or Impliedly Tried Any Issue Not Raised in the Pleadings.

"To determine whether a trial court properly denied a motion to amend the complaint to conform to the evidence, we first review for correctness the trial 'court's conclusion that the parties tried [or did not try] an issue by express or implied consent.'" *Eldridge*, 2007 UT App 243 at ¶19 (quoting *Fibro Trust, Inc. v Brahman Fin., Inc.*, 1999 UT 13, ¶ 8, 974 P.2d 288. Based on rule 15(b), there are "two situations in which a party may seek to amend the pleadings to conform to the evidence. The first situation—the mandatory amendment—requires the trial court to allow amendment of the pleadings if the parties tried the issues by express or implied consent." *Id.* at ¶ 36. "The second situation—the permissive amendment—applies where the parties did not try the issue by express or implied consent." *Id.* at ¶ 37. "[I]n instances where the parties did *not* try the issues by express or implied consent,

> [t]he trial court's discretion to grant amendment of the pleadings is conditioned on the satisfaction of two preliminary requirements: [1] a finding that the presentation of the merits of the action will be subserved by amendment and [2] a finding that the admission of such evidence would not prejudice the adverse party. . . . The trial court has only limited discretion in making these preliminary findings. . . .

Id. (quoting *Fibro Trust, Inc.*, 1999 UT 13 at ¶ 9). Finally,

> if the parties did not try the issues by express or implied consent but the two preliminary requirements have been met, "the trial court has full discretion to allow amendment of the pleadings; that is, it may grant or deny a party's motion for amendment upon any reasonable basis, and the court's decision can be reversed only if abuse of discretion appears."

Id. Here, the trial court never ruled as to whether Defendant had "tried" the "existing" policy claim under subsection "g." However, if it had, it is irrefutable that Defendant neither expressly nor impliedly consented to this new argument. Defendant filed its Motion for Summary Judgment. (R. at 419-20.) Plaintiffs filed a responsive memorandum in opposition, arguing the subsection (g) existing insurance policy position. (R. at 432-46.) Defendant expressly refused to engage Plaintiffs on that issue in Defendant's Reply Memorandum in Support of Motion for Summary Judgment. (Ex. "1," at 2-8.))[6]

This very Court in *Eldridge* specifically found that no "trial" of new issues occurred where a party "clearly objected to the [plaintiffs'] introduction of new claims whenever they arose. 2007 UT App 243 at ¶ 38. Plaintiffs raised their new claim under subsection "g" for "existing" policies for the very first time in their Memorandum in Opposition to Motion for Summary Judgment. (R. at 443-48.) At the very first opportunity, Defendants made clear their objection to the introduction of Plaintiffs' new claim in its Reply Memorandum in Support of Motion for Summary Judgment. (Ex. "1," at 2-8.) Defendant has never consented to Plaintiffs' request that this Court consider this

[6] The trial court entered an order under Rule 11(h) supplementing the record to include Defendant's Reply Memo in Support of Motion for Summary Judgment, attached as Ex. "1.")

new claim.

Despite Defendant's clear objections to the introduction of Plaintiffs' new claims, Plaintiffs argue that Defendant impliedly consented to this new claim in its affirmative defense and by failing to object to Plaintiffs' response to Defendant's request for admissions when Plaintiffs were asked to admit that subsection "b" did not apply. (Appellants' Br. at 37.) However, this argument only supports Defendants' contention that it disputed Plaintiffs' claims raised in their Complaint. Furthermore, Defendant had no reason to object to Plaintiffs' admission that subsection "b" did not apply, since Defendant's position was always that subsection "b" was in applicable. Plaintiffs' claims that a substantial amount of discovery took place on subsection "g" is also unavailing since Plaintiffs were entitled to conduct discovery on any of Defendant's affirmative defenses, which included the defense that subsection "b" did not apply because Plaintiffs did not have a "new" policy. Ultimately, Defendant never consented to trial of any part of Plaintiffs' new claims under subsection "g." Discovery does not constitute trial of an issue. Even if this Court made the unlikely finding that discovery in this case showed an implicit "trial" of the new claim, the trial court still had a wide range of discretion in denying amendment under Rule 15(b)'s permissive prong. Therefore, this Court should uphold the trial court's denial of Plaintiffs' Rule 15(b) motion.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' RULE 15(a) MOTION FOR LEAVE TO AMEND THEIR COMPLAINT.

The trial court properly exercised its discretion in denying Plaintiffs' Rule 15(a) motion for leave to amend their complaint. For the reasons stated in Part IV.B., *supra*,

Plaintiffs' Rule 15(a) motion is also untimely. Furthermore, for the reasons stated in Part IV.C., *supra*, the trial court could not have granted relief under Rule 15(a) because it did not grant relief under Rule 59(e). Thus, the trial court had no choice but to deny Plaintiff's Rule 15(a) motion. Alternatively, and despite these two compelling reasons for the trial court's denial of this motion, Plaintiffs have otherwise failed to show entitlement to relief under Rule 15(a).

Utah courts focus on a three-pronged test for determining the appropriateness of granting a motion to amend under Rule 15(a). In *Regional Sales Agency, Inc. v. Reichert*, the Utah Court of Appeals stated that "[i]n analyzing the grant or denial of a motion to amend, Utah courts have focused on three factors: the timeliness of the motion; the justification given by the movant for the delay; and the resulting prejudice to the responding party." *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, ¶ 26, 87 P.3d 734 (quoting *Regional Sales Agency, Inc. v. Reichert,* 784 P.2d 1210, 1216 (Utah Ct. App. 1989), *rev'd on other grounds by* 830 P.2d 252 (Utah 1992)).

However, "courts should not regard these three factors as an exclusive list." *Kelly*, 2004 UT App 44 at ¶ 39. The Utah Supreme Court has indicated that "the[se] factors should be considered *alongside* any other factors that the trial court might deem relevant in a particular case." *Id.* at ¶ 40 (emphasis added) (citing *Aurora Credit Servs., v. Liberty West. Dev., Inc.*, 970 P.2d 1273, 1282 (Utah 1998)). "[T]his open-factored approach is consistent with the broad grant of discretion that is afforded to trial courts when ruling on motions to amend" because

> [t]rial courts are in a much better position than appellate

> courts to make such case-specific determinations as whether too much time has passed to fairly allow an amendment, whether a party's delay is the result of an unfair tactic or dilatory motive, or whether some other unforeseen factor militates for or against a particular result in that particular case. . . . Thus, insofar as our earlier cases have perhaps led some to conclude that rule 15(a) is governed by an exclusive three-part analysis, we now wish to stress that the motion to amend analysis is instead a multi-factored, flexible inquiry that allows trial courts the leeway to evaluate the factual circumstances and legal developments involved in each particular case.

Kelly, 2004 UT App 44 at ¶41.

Unfortunately, the trial court did not reach this analysis in denying Plaintiffs' Rule 15(a) motion.[7] With this backdrop, this Court should uphold the trial court's denial of Plaintiffs' motion to amend under Rule 15(a). Plaintiffs' motion is indisputably untimely. It came several months after the end of fact discovery, after Defendant filed a Motion for Summary Judgment, and after the trial court granted summary judgment. Also, Plaintiffs have never given a single, justifiable reason as to why they waited so long to seek leave to amend their Complaint, stating that they simply believed their reference to breach of "Utah law" somehow met Utah's notice pleading standard. Finally, Defendant would be extremely prejudiced by the untimely amendment of Plaintiffs' Complaint in that they would have to re-open fact discovery, determine whether additional experts are needed, change their entire litigation strategy, re-depose several witnesses, and incur the additional expenses of such discovery, all based on Plaintiffs'

[7] The trial court denied the Rule 15(a) motion because Plaintiffs' had not met their burden under Rule 59(e) and had not distinguished the *Asael* case. (R. at 849.) Even if this Court allowed amendment of the judgment under Rule 59(e), it would have to remand back to the trial court the decision as to whether amendment under either Rule 15(a) or 15(b) is appropriate in light of the broad discretion given to trial courts in deciding these issues.

failure to adequately plead the claims they now contend to have been adequately raised in their Complaint.

In *Kelly*, this Court reversed the trial court's denial of plaintiff's motion to amend. 2004 UT App 44 at ¶ 47. In doing so, the court discussed reasons why plaintiff's motion to amend should have been granted. The court stated:

> Under the general principles set forth above, we conclude that the trial court should have granted Kelly's motion to amend. We first note that the litigation was still in its initial procedural stages when Kelly filed his motion to amend. The trial court had not yet established any deadlines for discovery or for the filing of amended complaints, nor had the court yet set a date for trial or entered any rulings dismissing any of the claims or parties. Kelly's motion to amend was filed on April 2, 2002, barely six months after the filing of the original complaint. This litigation had not yet concluded its first year, let alone gone through the several years of litigation that are typically present in cases of untimeliness.
>
> Further, it does not appear from the record that Kelly's delay in seeking leave to add the additional claims was motivated by a dilatory or improper motive.

Id. at ¶¶ 49-50. Every single one of these factors weighs against Plaintiffs and in Defendant's favor.

First, the litigation in this case was not in its initial procedural stage when Plaintiffs filed their motions to amend; rather the case was concluded by summary judgment. Second, this Court had already established a deadline for fact discovery, which ended on December 31, 2007 under the original Case Management Order. (R. at 38.) Plaintiffs' motions to amend were filed well over two years after commencement of this action. Finally, based on Plaintiffs' failure to provide a single reason or justification

for failing to seek leave to amend earlier, no other reason for their failure exists other than a dilatory or improper motive.

In addition to the fact that each of these factors weigh heavily in Defendant's favor, it is not essential that every factor weigh in Defendant's favor. In addressing whether any particular factor is more important than the other when considering a motion to amend, this Court stated:

> Finally, although the general approach should be multi-factored, the circumstances of a particular case may be such that a court's ruling on a motion to amend can be predicated on only one of two of the particular factors. *See First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc.*, 820 F.2d 1127, 1133 (10th Cir. 1987) ("We hold that a district court acts within the bounds of its discretion when it denies leave to amend for 'untimeliness" or 'undue delay.' Prejudice to the opposing party need not be shown also."). Thus, depending on the facts of a particular case, the weight that a court gives to one or another particular factor may vary.

Kelly, 2004 UT App 44 at ¶ 42. Thus, while all of the factors listed above support denial of Plaintiffs' motion to amend under Rule 15(a), this Court can give different weight to any particular factor.

In addition, as noted previously, Plaintiffs' effort to amend is not legitimate. Plaintiffs contended in their Complaint that Defendant acted in bad faith because it refused to acknowledge that the insurance policy at issue was a new policy. When they ultimately concluded that this argument was fallacious, they persisted in their assertion of bad faith but tried to find a different fact or theory to support their bad faith claims. Essentially, they started with the conclusion—bad faith—then worked backwards to find theories or facts to support it, all without making a formal change to their Complaint.

In summary, Plaintiffs' Rule 15(a) motion is untimely. More importantly, the trial court properly denied this motion based on its denial of Plaintiffs' Rule 59(e) motion. Despite these two compelling reasons, and applying the very analysis and factors used by the *Holmes* and *Kelly* courts, this Court should find that the trial court did not abuse its discretion in denying Plaintiffs Rule 15(a) motion.

CONCLUSION

This case deals with Plaintiffs' unfounded contention that they are entitled to more UIM coverage than what they were actually paying for, and what their insurance policy actually stated. Plaintiffs filed suit against Defendant claiming that Defendant failed to obtain the signed acknowledgement form required of a "new" insurance policy, implicating Utah Code Ann. § 31A-22-305(9)(b). The suit alleged that Defendant had acted in bad faith in failing to procure the waiver. However, once it became apparent to Plaintiffs that their argument failed as a matter of law, they raised a new argument that their policy was in fact an "existing" policy, implicating Utah Code Ann. § 31A-22-305(9)(g), still claiming that Defendant acted in bad faith. It is apparent that Plaintiffs intended to pursue an insurance bad faith claim no matter what the facts were. That is, Plaintiffs started with the conclusion that Defendant had committed bad faith, and then sought out facts or theories to support the claim; they allowed the result (bad faith damages) to dictate their claims ("new" or "existing" policy.)

This Court should uphold the trial court's grant of summary judgment based on Plaintiffs' failure to adequately plead their new claim arising under Utah Code Ann. § 31A-22-305(9)(g). This Court should also rule that Plaintiffs' failure to comply with

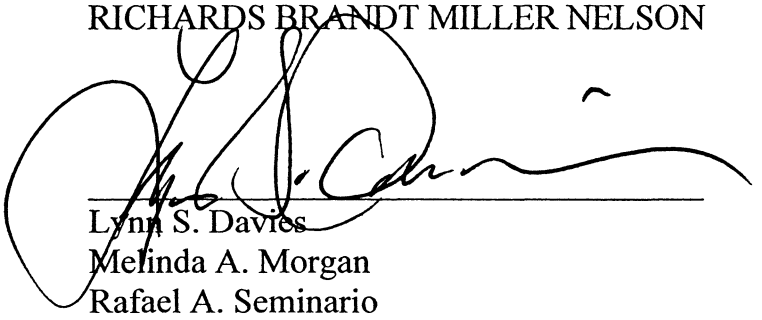
Rule 4(b)(2) of the Utah Rules of Appellate Procedure prevents it from exercising jurisdiction over Plaintiffs' three post-judgment motions. Alternatively, this Court should find that the trial court did not abuse its discretion in denying Plaintiffs' Rule 59(e) motion to conform the pleadings to the evidence, based on the numerous justifications given by the trial court. Without alteration or amendment of the judgment, Plaintiffs could not obtain amendment of their pleadings pursuant to either Rules 15(a) or 15(b). Consistent with the trial court's reasoning in granting summary judgment and denying Plaintiffs' three post-judgment motions, this Court should uphold such rulings.

ADDENDUM

No Addendum is necessary as all pertinent statutes and rules are listed verbatim in this brief.

DATED this 28th day of October, 2009.

RICHARDS BRANDT MILLER NELSON



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was hand-delivered on this 28th day of October, 2009, to the following:

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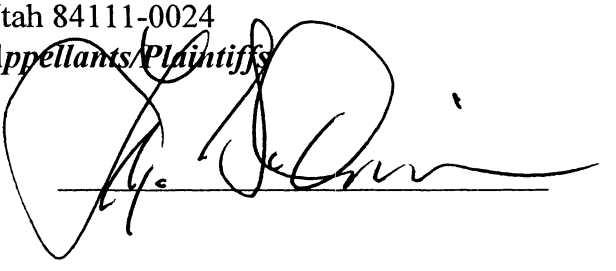

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

RAYMOND E. CASADAY and ELLEN CASADAY, Plaintiffs, vs. ALLSTATE INSURANCE COMPANY, Defendant.	**REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** Civil No. 060916782 Judge Joseph C. Fratto, Jr.

Defendant Allstate Insurance Company, by and through its counsel of record, Lynn S. Davies, Melinda A. Morgan, and Rafael A. Seminario of the law firm of RICHARDS BRANDT MILLER NELSON, hereby submits this Reply Memorandum in Support of Motion for Summary Judgment pursuant to Rules 7 and 56 of the Utah Rules of Civil Procedure.

INTRODUCTION

Defendant has moved for summary judgment on the claims and issues raised in Plaintiffs'

Complaint. This complaint alleges that Plaintiffs had a "new policy" in 2001, that they never signed a waiver of underinsured motorist coverage, and that Allstate therefore failed to comply with Utah Code Ann. § 31A-22-305(9)(b). All claims and all theories of recovery stated in Plaintiffs' complaint stem from the alleged violation of this specific statute. However, based on the memoranda submitted by both parties related to this Motion for Summary Judgment, no dispute exists that Plaintiffs' insurance policy was in fact an "existing" policy and not a "new" policy as alleged by Plaintiffs. In fact, Plaintiffs have specifically stated that they "concede that their policy would likely be considered as an existing policy, rather than a new policy. . . ." (Pl.'s Mem. Opp'n. Summ. J. 4.) Such an admission entitles Defendant to summary judgment.

In opposing summary judgment, Plaintiffs offer two arguments: (1) that their complaint should be liberally construed so as to create claims not raised in their Complaint, and (2) that questions of material fact exist on the unstated theories they now wish to present, *i.e.*, the issue of the SB 189 notice under §31A-22-305(9)(h). With regard to their first argument, Utah appellate law unequivocally states that Plaintiffs' failure to include claims and grounds for such claims in their complaint precludes this Court from addressing such claims in Defendant's Motion for Summary Judgment. Regarding their second argument, this Court may not consider it because Defendant has not even raised this issue in its summary judgment motion and because the Complaint failed to raise SB 189 as an issue in this case, in stark contrast to the long-established and basic jurisprudential principle that claims are restricted to those raised in the Complaint.

ARGUMENT

I. NO GENUINE ISSUES OF MATERIAL FACT EXIST TO PRECLUDE SUMMARY JUDGMENT.

This Court should grant Defendant's Motion for Summary Judgment based on the admissions made in Plaintiffs' opposition memorandum. In it, Plaintiffs "concede that their policy would likely be considered as an existing policy, rather than a new policy . . . ." (Pl.'s Mem. Opp'n. Summ. J. 4.) This admission refutes the allegations made in their own complaint that Defendant failed to comply with Utah Code Ann. § 31A-22-305(9)(b). That was their only stated basis for all claims in their complaint. Furthermore, Plaintiffs have admitted that their own experts agree that Defendant did not violate § 31A-22-305(9)(b). (*See* Pl.'s Mem. Opp'n. Summ. J. 5.) As a result, no dispute exists as to Defendant's entitlement to summary judgment on the claims raised in Plaintiffs' complaint.

II. PLAINTIFFS HAVE FAILED TO COMPLY WITH UTAH'S NOTICE PLEADING STANDARD, WHICH PREVENTS THEM FROM PURSUING THEIR SB 189 CLAIM.

Utah law does not allow Plaintiffs to disregard their complaint and pursue claims not previously and adequately raised. Plaintiffs argue that they did comply, and in support of this argument, Plaintiffs cite (a) to several rules of the Utah Rules of Civil Procedure, and (b) to some Utah cases which they believe support their position. These arguments fail in light of the clear and unequivocal position that Utah appellate courts have taken on this issue over the last half century.

a. Plaintiffs Have Failed to Comply With the Rules They Cite in Support of Their Claim of Compliance with Utah's Notice Pleading Standard.

Plaintiffs erroneously rely on Rule 8(e)(1), 8(f), and 1(a) of the Utah Rules of Civil Procedure to support their claim that they have preserved their SB 189 claim. Rather than dispute their entitlement to recovery based on the allegations in their complaint related to § 31A-22-305(9)(b), which they now understand to fail as a matter of law, Plaintiffs have stated that the allegations, claims, and grounds in their complaint allow them to pursue a claim not explicitly raised in their complaint. Rule 8(e)(1) requires allegations to be "simple, concise and direct," Rule 8(f) requires courts to construe pleadings in a manner consistent with "substantial justice," and Rule 1(a) requires courts to "liberally construe" pleadings. Plaintiffs have complied with all of these requirements as they relate to their claims under § 31A-22-305(9)(b); Defendant has never argued to the contrary. However, Plaintiffs have completely failed to comply with these requirements as they relate to their SB 189 claim.

It is well settled under Utah law that "a plaintiff is required, under [Utah's] liberal pleading standard of notice pleading, to submit a 'short and plain statement . . . showing that the pleader is entitled to relief' and 'a demand for judgment for the relief.'" *Canfield v. Layton City*, 2005 UT 60, 14, 122 P.3d 622 (omission in original) (quoting Utah R. Civ. P. 8(a)(1)-(2)). In addition, "[t]he plaintiff must only give the defendant 'fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.'" *Id.* (citation omitted). However, "*it must do at least that much.*" *Asael Farr & Sons Co. v. Truck Ins. Exch.*, 2008 UT App 315, ¶ 17, 193 P.3d 650 (emphasis added) (citing *Harper v. Evans*, 2008 UT App

165, ¶ 13, 185 P.3d 573. Here, Plaintiffs have not done "at least that much." Instead, Plaintiffs have cited to the following portions of their complaint to support their argument that they have provided the required "fair notice" to defendant:

> 12. *In violation of Utah law and contrary to the facts,* defendant advised plaintiffs that their policy of insurance only provided underinsured motorist coverage in the amount of $10,000, up to $20,000 per occurrence.
>
> 15. The defendant has *refused to pay the limits of underinsured motorist coverage required . . . by law.*

The two citations accomplish only one thing—to allege that "Utah law" has been violated. Plaintiffs now ask this Court to find that a reference to a breach of "Utah law" provides sufficient notice to Defendant of the nature and basis of the claims asserted. Defendant cannot be expected to canvas the entirety of "Utah law" to divine the claims Plaintiffs might someday assert. Otherwise, all a plaintiff would have to do in a complaint is make a bald assertion that "Utah law" has been violated in order to maintain a cause of action. Fortunately, several Utah courts have addressed this issue and have refuted the position taken by Plaintiffs.

In *Asael*, the Utah Court of Appeals addressed whether the allegations in the plaintiff's complaint satisfied the "fair notice" requirements stated above. The court stated:

> Nowhere in the third amended complaint, or in the three complaints that preceded it, does [plaintiff] allege that any of the defendants had actually bound adequate coverage but refused to pay the amounts due under that orally bound policy. Rather [plaintiff's] claims, which all arise out of its contention that the defendants failed to ensure that [plaintiff] was covered for all of its significant risks, *are directly contrary to such a position.* And we see nothing *in the complaint* to suggest that [plaintiff] intended to assert the existence of adequate coverage as an alternative theory. Consequently, the third amended complaint does not give

> Appellees fair notice of the nature and basis of the oral binder theory *and was therefore not properly before the court at the time of summary judgment.*

2008 UT App 315, ¶18 (emphasis added) (footnote omitted). This case reveals three important similarities to the present case. First, the court did not allow the plaintiff to present a claim that was "directly contrary" to its previous position, which also applies in this case. Plaintiff first claimed that their insurance policy was a "new" policy. The only other option was that such a policy constituted an "existing" policy, which is exactly opposite of their claim that it was "new." Second, the court analyzed "the complaint" to see if the claim was raised as an alternate theory, and made no attempt to determine whether discovery had occurred on that particular claim or whether the opposing party had some other "notice" and opportunity to defend which Plaintiff claim applies. Finally, the court held that this new issue was "not properly before the court at the time of summary judgment." Plaintiffs similarly request that this Court consider the SB 189 claim "at the time of summary judgment," which the Court of Appeals has expressly denied. Ultimately, the *Asael* court concluded as follows:

> [Plaintiff's] oral binder claim was first raised, after approximately three years of discovery, in Farr's memorandum in opposition to [defendant's] motion for summary judgment. Rejecting this tactic, the Utah Supreme Court explained: "A plaintiff cannot amend the complaint by raising novel claims or theories for recovery in a memorandum in opposition to a motion to dismiss *or for summary judgment* because such amendment *fails to satisfy Utah's pleading requirements*."

Id. at ¶ 18 (quoting *Holmes Dev , LLC v. Cook*, 2002 UT 38, ¶ 31, 48 P.3d 895) (emphasis added) (footnote omitted). Plaintiffs have also failed to satisfy Utah's pleading requirements.

The Utah Supreme Court has also addressed the tactics being used by Plaintiffs in *Holmes Dev., LLC v. Cook.* In *Holmes*, the plaintiff attempted to raise new claims for breach of

duties outside those duties imposed by the contract at issue and which plaintiff had not raised in its complaint. 2002 UT 38, ¶ 30. The court responded by stating that the "claim was originally raised in [plaintiff's] memorandum in opposition to [defendant's] motion to dismiss/for summary judgment, and was not raised in the complaint. . . . *[Plaintiff's] claims must therefore be restricted to the grounds set forth in the complaint.*" *Id.* at ¶ 31 (emphasis added). Again, the Utah Supreme Court did not analyze or address whether the defendant had an opportunity to engage in discovery related to the new claim raised for the first time or whether they had adequate notice beyond the notice required in the complaint. Likewise, this Court should not allow Plaintiffs to raise their new SB 189 claim when considering this motion for summary judgment.

The Utah Court of Appeals in *Harper v. Evans* came to the same conclusion reached by numerous Utah courts regarding Plaintiffs attempt to make new claims not raised in their complaint. In *Harper*, the plaintiff claimed that the defendant "negligently performed the November 2002 surgeries 'and nothing more.'" 2008 UT App 165, ¶ 13, 185 P.3d 573 (quoting *Collins v. Wilson*, 1999 UT 56, ¶ 11 n.9, 984 P.2d 960). However, plaintiff attempted to raise a new argument of defendant's negligent course of treatment after the surgeries. The court held that "[t]hese allegations, standing alone, do not state a claim for relief for continuous negligent treatment, *even under Utah's liberal notice pleading requirements.*" *Harper*, 2008 UT App 165, ¶ 13. The court further explained:

> In so holding, we emphasize that we cannot rely on the allegations of a negligent course of treatment raised for the first time in the Harpers' opposition to summary judgment. . . . The Harpers were free to seek leave to amend their complaint to

> allege new or different causes of action, *see* Utah R. Civ. P. 15(a), but having failed to do so they could not effectively raise such new claims in their opposition brief. *See Holmes Dev.*, 2002 UT 38, ¶ 31, 48 P.3d 895 (stating that in the absence of proper amendment, "claims must . . . be restricted to the grounds set forth in the complaint").

Id. at ¶ 14. Plaintiffs have not even sought to amend their complaint, presumably because Utah case law would prohibit them from amending at this late stage in litigation, especially when trial has been set and Defendant would be prejudiced by being required to file an answer to an amended complaint, re-open discovery, and further delay resolution of this matter. In any event, this Court should not consider any claims that have not been timely and properly raised.

b. The Utah Cases Plaintiffs Cite in Support of Their Claim of Compliance with Utah's Notice Pleading Standard are Easily Distinguishable, and Inapplicable.

In support of their claim of compliance with Utah's notice pleading standard, Plaintiffs cite to *Blackham v. A.M. Snelgrove* for the proposition of "fair notice," and to *Timm v. Dewsnup* for the proposition that the "pleadings are never more important than the case." However, each of these cases is easily distinguishable and inapplicable to the present case.

In 1955, the Utah Supreme Court in *Blackham* dealt with a Rule 12(b)(6) motion for failure to state a claim upon which relief could be granted, and held that the plaintiff's complaint was sufficiently pled. 280 P.2d 453, 453, 455 (Utah 1955). However, a Rule 12(b)(6) standard is completely different from the standard and issue in the present case. There, the plaintiff made allegations of entitlement to money; defendant claimed that plaintiff's failure to allege that he was the "owner" of the money merited dismissal. *Id.* at 453. The court concluded that plaintiff had sufficiently pled entitlement to the money because "it [did] not appear to a certainty that

plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." *Id.* at 455. This issue does not apply to the present case. Defendant has never alleged that Plaintiffs' complaint was insufficient as a matter of law. Indeed, Plaintiffs have successfully alleged Defendant's failure to comply with Utah Code Ann. § 31A-22-305(9)(b), although now proven wrong. However, whether Plaintiffs have alleged sufficient facts to withstand dismissal under Rule 12(b)(6) is completely different from the issue of whether they have even raised a claim for purposes of summary judgment. The case law cited above refutes their claim that they adequately and timely raised the SB 189 issue.

Plaintiffs also cite to *Timm v. Dewsnup,* which also does not apply in this case. Ironically, Plaintiffs have cited to a case that involves an appeal of a trial court's order disallowing amendment of a complaint—something which Plaintiffs have failed to do altogether and which is not even an issue in this summary judgment motion. Plaintiffs failed to provide the entire quote from the court in *Timm.* This remainder of the quote reads as follows:

> The pleadings are never more important than the case that is before the court. . . . There can be no prejudice in this case because we'll give ample time for an answer. . . . This is in harmony with what we regard as the correct policy: of recognizing the desirability of the pleadings setting forth *definitely framed issues*, but also of permitting amendment where the interest of justice so requires, *and the adverse party is given a fair opportunity to meet it.*

851 P.2d 1178 (Utah 1993) (emphasis added). Here, Plaintiffs have not even requested leave to amend their complaint, and yet urge this Court to provide the same relief given to a party that had properly and timely requested leave to amend.

In *Wright v. Univ of Utah*, the Utah Court of Appeals addressed a similar claim for relief

from a party who failed even to request leave to amend a complaint. The plaintiff in *Wright* filed a complaint against a University of Utah employee, claiming he had "assaulted and struck" her. 876 P.2d 380, 381-82 (Utah Ct. App. 1994). Later, plaintiff attempted to claim that the "assault" may have been unintentional.[1] *Id.* at 384. The plaintiff argued that her complaint should have been "broadly construed" to allow a reading that the terms "assaulted and struck" could encompass an unintentional act, "especially where the [defendant] was on notice from plaintiff's response to its motion for judgment on the pleadings that she was attempting to assert an unintentional hitting." *Id.* The court concluded that "[w]hile it is true that Utah has adopted liberal notice pleadings requirements . . . *those requirements cannot be applied in a vacuum.*" *Id.* (emphasis added). The court went further:

> Wright claims that even if we determine that her complaint alleges an assault, we should nonetheless conclude that the trial court erred by failing to provide her the opportunity to amend her complaint to allege an unintentional hitting. *This claim fails because Wright never attempted to amend her complaint, and instead stood by her allegations as originally pleaded even in the face of potential dismissal.*

Id. at 385 (emphasis added). Plaintiffs have stood by their allegations and have refused to even acknowledge that their Complaint fails to raise SB 189 as a claim, "even in the face of potential dismissal." The cases cited by Plaintiffs fail to support their position of their compliance with Utah's notice pleading standard. Furthermore, Utah appellate courts have considered their arguments and have ruled against them on several occasions, including as recent as this year on two separate occasions.

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[1] It is important to note that even though the *Wright* case dealt with a Motion to Dismiss under Rule 12(b)(6) and the sufficiency standard was arguably more difficult to prove as evidenced by the *Blackham* case addressed above, the court still upheld dismissal of the claims and disallowed the plaintiff to pursue her unintentional tort claim

CONCLUSION

This Court should not consider any of Plaintiffs' arguments or claims related to SB 189 in addressing Defendant's Motion for Summary Judgment. Numerous Utah appellate court decisions prevent consideration of such unstated claims. Plaintiffs have relied on Utah's liberal pleading standard as the basis for defeating summary judgment, since they have already conceded that they cannot prevail in their claims as presently pled in their Complaint. Instead, Plaintiffs now request that this Court rule that their claims of Defendant's alleged breach of "Utah law" somehow satisfies their requirements under the Utah Rules of Civil Procedure. The Utah Supreme Court has unequivocally ruled otherwise. In addition, Plaintiffs' failure to timely and adequately request leave to amend their pleadings to conform to Utah's liberal pleading standard contradicts the very case it used to support their claim of compliance. Therefore, Defendant respectfully requests that this Court grant its Motion for Summary Judgment and refuse to consider Plaintiffs' claims related to SB 189, which they failed to raise in the Complaint that governs and limits the scope of their claims.

DATED this 5th day of December, 2008.

RICHARDS BRANDT MILLER NELSON

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 5th day of December, 2008, to the following:

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